NO. 05-8820

IN THE SUPREME COURT OF THE UNITED STATES

GARY LAWRENCE,

Petitioner,

VERSUS

STATE OF FLORIDA,

Respondent.

ORIGINAL

Supreme Court, U.S.
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ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Capital Case
Questions Presented for Review

I. There is a split in the circuits about whether the one-year period of limitations is tolled for "[t]he time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment of claim is pending . . . ." Antiterrorism and Effective Death Penalty Act (AEDPA) 28 U.S.C Section 2244(d) (2). Where a defendant facing death has pending a United States Supreme Court certiorari petition to review the validity of the state's denial of his claims for state post-conviction relief, does the defendant have an application pending which tolls the 2244(d)(2) statute of limitations?

II. Alternatively, does the confusion around the statute of limitations -- as evidenced by the split in the circuits – constitute an "extraordinary circumstance," entitling the diligent defendant to equitable tolling during the time when his claim is being considered by the United States Supreme Court on certiorari?

III. And in the second alternative, do the special circumstance where counsel advising the defendant as to the statute of limitations was registry counsel – a species of state actor – under the monitoring supervision of Florida Courts, with a statutory duty to file appropriate motions in a timely manner,[1] constitute an "extraordinary circumstance" beyond the defendant's control such that the doctrine of equitable tolling should operate to save his petition?

[1] Florida Statutes Section 27.711(12)

PARTIES TO THE PROCEEDING COMPLIANCE WITH RULE 14(b)

The parties concerned are included in the caption of this matter and there are no corporate parties.

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Opinions Below

A. Direct appeal.

In March 1995, a Florida jury convicted Gary Lawrence of one count each of premeditated murder in the first degree, conspiracy to commit murder, petit theft, and grand theft of a motor vehicle. Following the jury's recommendation of a death sentence based on the murder conviction, the trial court sentenced Lawrence to death. The Florida Supreme Court affirmed Lawrence's conviction and sentence.[1] Court denied certiorari review from the substantive conviction on January 20, 1998.[2]

B. Collateral Proceedings.

From January 1999 to November 2002, Lawrence sought post conviction relief in Florida Courts. The trial court denied Lawrence's petition for state post-conviction relief on October 11, 2000. And on October 17, 2002, the Florida Supreme Court affirmed the trial court's denial of state post-conviction relief.[3] Lawrence petitioned this Court for Certiorari relief from that denial.

On March 11, 2003 -- while his petition not yet having been ruled on was still before this Court – Lawrence sought habeas relief in federal court pursuant to 28

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[1] *Lawrence v. State*, 698 So.2d 1219 (Fla.1997).

[2] *Lawrence v. Florida*, 538 U.S. 926 (2003).

[3] *Lawrence v. State*, 831 So.2d 121 (Fla.2002).

U.S.C. § 2254. Thirteen days later, on March 24, 2003, this Court denied certiorari review of the Florida Supreme Court's denial of post-conviction relief.[4]

C. The Timeliness of Lawrence's Federal Habeas Petition.

The State responded to Lawrence's March 11, 2003 (and supplemental pleadings), urging the federal habeas petition's dismissal on the ground Lawrence was time-barred. The State also argued that equitable tolling should not apply in Lawrence's case. Lawrence opposed the dismissal because there was a disagreement among the Circuits on the question of whether a petition for certiorari to this Court following the denial of state post-conviction relief tolls the limitation period.

Lawrence further argued that doctrine of equitable tolling should operate to save his petition since (1) counsel who advised him of the timing of his petition was selected, pre-qualified and monitored by the State of Florida under its registry statute; (2) Lawrence's mental abilities prevented him from meaningfully participating in a relationship with his counsel; and (3) he had a facially strong constitutional claim.

On April 12, 2004, the district court entered an order staying the proceedings. Although rejecting the equitable tolling argument, the court found that the petition's timeliness "depends upon whether the one-year limitations period was tolled during the pendency of Petitioner's petition for writ of certiorari in the United States Supreme

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[4] *Lawrence v. Florida*, 538 U.S. 926 (2003).

Court challenging the state court's denial of his motion for state collateral review."[5]

The court noted that although Eleventh Circuit precedent stated that the limitations period was not tolled during the pendency of a petition for certiorari challenging the state court's denial of post-conviction relief,[6] there was a split the Circuits.[7] Because of the then-pending certiorari petition in *Abela v. Martin*[8] which held contrary to Eleventh circuit's position on the statute of limitations, the district court entered an order staying the proceedings.[9] The district court noted that if the Supreme Court denied review in *Abela*, then it would dismiss Lawrence's petition based on Eleventh Circuit law.[10]

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[5] Dist. Ct. Order 28 at 1-2.

[6] *Coates v. Byrd*, 211 F.3d 1225 (11th Cir.2000)("[T]he time during which a petition for writ of certiorari is pending, or could be filed, following the denial of collateral relief is state courts, is not to be subtracted from the running of time for 28 U.S.C. Section 2244(d)(1) statute of limitations purposes.")

[7] *Abela v. Martin*, 348 F.3d 164, 170 (6th Cir. 2003) ("[I]f there is a certiorari petition pending to review the validity of the state's denial of such an application for state post-conviction review, the application is still pending . . . ." (quotations omitted))

[8] Certiorari denied sub nom. *Caruso v. Abela*, 541 U.S. 1070, 124 S.Ct. 2388, 158 L.Ed.2d 976 (2004).

[9] The State took an interlocutory appeal from this ruling, arguing that the trial court lacked power to stay the proceedings. That appeal was ultimately dismissed by the United States Court of Appeals for the Eleventh Circuit.

[10] Dist. Ct. Order 28 at 1-2.

About six weeks later, on May 27, 2004, when the Supreme Court denied review in *Caruso v. Abela*, the district court noted in an order that Lawrence's petition was time-barred based on *Coates v. Byrd*[11] and ultimately dismissed the petition. Lawrence filed a motion for a Certificate of Appealability (COA), which the district court granted, stating the question was "whether the one-year limitations period applicable to a petition for writ of habeas corpus under 28 U.S.C. § 2254 barred this petition, and on the legal issue whether the statute of limitations is tolled during the pendency of a petition for writ of certiorari in the United States Supreme Court challenging the state court's denial of petitioner's earlier motion for state collateral review."[12] The Eleventh Circuit Court of Appeals affirmed the dismissal on August 26, 2005.[13]

Jurisdiction

The Eleventh Circuit Court of Appeals' jurisdiction was invoked from the denial by the United States District Court for the Northern District of Florida of a Motion to Vacate filed under Title 28 United States Code, Section 2254, in this Death Case, under Title 28 United States Code, section 1291.

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[11] Dist. Ct. Order 34 at 2.

[12] Dist. Ct. Order 45, at 4.

[13] *Lawrence v. Florida*, 421 F.3d 1221 (11th Cir. 2005)

The Court of Appeals' decision was entered on August 26, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1)

Constitutional and Statutory Provisions

This case concerns the interpretation of the habeas corpus statute. Chapter 153 of the AEDPA includes a statute of limitations and tolling provision for federal habeas petitions filed by state prisoners. 28 U.S.C. § 2244(d)

> (d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—
>
> > (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
> >
> > (B) the date on which the impediment to filing an application created by the State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
> >
> > (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court and made retroactively applicable by the Supreme Court and made retroactively applicable to cases on collateral review; or
> >
> > (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
>
> (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

Statement of the Case

Lawrence was found guilty, along with his wife, of the beating death of his wife's lover.[14] The relevant facts to the questions presented in this pleading are generally set out the Opinions Below section above. But on the issue of equitable tolling, these facts are also material: Lawrence's trial counsel recognized that Lawrence is "very, very slow."[15] In fact, experts opined that Lawrence's full scale IQ is 81 – the lowest part of the low average range. And none of his other scores match what would be expected of someone with an IQ of 81. Lawrence never achieved anything more than a person with a borderline retarded range. He reads like an 11-year old, although he is over 40; his writing skills fall slightly under those of a 9-year old; his factual knowledge is that of an 11-year old.[16] He left school in the 7th grade, yet was unable to read; his IQ placed him in the lowest fifth percentile of children – only four out of 100 children would place lower than he.

Reasons for Granting the Writ

The issues here presented–whether the AEDPA's timeclock does not contemplate time abeyance for the filing of a petition to this Court for Certiorari review–is one on

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[14] *Lawrence v. State*, 698 So.2d 1219,1220 (Fla. 1997)

[15] Tr. 46, 56

[16] Penalty Phase transcript 42,45,47, 48

which the Courts of Appeal are in conflict The position of the Eleventh Circuit Court of Appeals results in a time-bar in this Death Case, through no fault of Mr. Lawrence, would not be present in another Circuit.

The Eleventh Circuit Court of Appeals has decided this vitally important question of federal law which has not been, but surely should be, settled by this Court.

Also, the State of Florida has a special relationship to its Death Row defendants as the State post conviction scheme guarantees and monitors all post conviction State-appointed death row counsel.

Legal Presentation

1. The decision of the Sixth Circuit Court of Appeals in this case conflicts with the decisions of other United States Courts of Appeals regarding whether the habeas tolling provision for state post-conviction or other collateral review extends to certiorari proceedings before this Court. The Eleventh Circuit (and others) have concluded that the one-year statute of limitation applicable to federal habeas corpus petitions is **not** tolled during the period in which a petitioner may seek, and the Supreme Court considers whether to grant, certiorari review of the denial of the petitioner's State collateral relief motion.[1] The reasoning of this conclusion is that the

[1] See *Smaldone v. Senkowski*, 273 F.3d 133, 136-138 (2nd Cir. 2001); *Stokes v. District Attorney of the County of Philadelphia*, 247 F.3d 539, 542-543 (3rd Cir. 2001) cert denied; 534 U.S. 959 (2001); *Miller v. Dragovich*, 311 F.3d 574 (3rd. Cir. 2002); *Crawley v. Catoe*, 257 F.3d 395, 398-400 (4th Cir. 2001); *Ott v. Johnson*, 192

statute's language and underlying purpose justify a pre-certiorari time bar. Section 2244 (d)(1) includes the phrase conclusion of direct review, which was recently defined as the denial or conclusion of certiorari by this Court.[2] By contrast, Section 2244(d)(2) tolling provision stops the clock so long as a "state post-conviction or other collateral review . . . is *pending*." The argument goes that there is no textural basis for interpreting Section (d)(2) to include a federal appeal of collateral issues because the word pending does not conjure up for some minds the specter of federal review with the same intensity as the phrase "conclusion of direct review."

Three years after the Eleventh Circuit gave these reasons for not tolling during this Court's certiorari review, the Sixth Circuit, sitting *en banc*, reached the opposite conclusion in *Abela v. Martin*.[3] In that court's view, the difference in language between the subsections (d)(1) and (d)(2) was not significant. Instead, the court found that the language of subsection (d)(2) resolves the situation conclusively. That court

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F.3d 510, 513 (5th Cir. 1999); *Gutierrez v. Schomig*, 233 F.3d 490, 492 (7th Cir. 2000) cert denied, 532 U.S. 950 (2000); *White v. Klitzkie*, 281 F.3d 920, 923-925 (9th Cir. 2002); *Rhine v. Boone*, 182 F.3d 1153, 1155-1156 (10th Cir. 1999); *Coates v. Byrd*, 211 F.3d 1225, 1226 (11th Cir. 2000).

[2] *Bond v. Moore*, 309 F.3d 770, 771 (11th Cir. 2002)("Appellant argues that his petition was not time-barred because the limitation period did not begin to run until the 90-day window during which Appellant could have petitioned the United States Supreme Court for a writ of certiorari expired. We agree with Appellant."

[3] 348 F.3d 164, 170 (6th Cir. 2003) cert. denied *Caruso v. Abela*, 541 U.S. 1070, 124 S.Ct. 2388, 158 L.Ed.2d 976 (2004).

reasoned that the tolling provision required that the application for state post-conviction relief be *pending* – not that it be pending in state court. So while the petition is pending before this Court, it satisfies the statutory requirement – even through it is no longer pending in state court,

> If there is a certiorari petition pending review of the validity of the state's denial of such application for state post conviction review, the application is still "pending"– that is, not finally decided. The application does not thereby stop being a state habeas proceeding or turn into a federal rather than state application; it's just not finally decided yet.

Positions contrary to tolling are premised on misapprehensions of the statute and the nature of certiorari review. In other words, the petition remains a pending motion which has moved to its next phase before this Court. There is no independent jurisdiction to hear such matters as "new" petitions. The petition and the entire litigation remains a pending state motion to vacate unless and until this Court speaks or the time in which to seek Certiorari review has expired.

In *Rhine v. Boone*, the Tenth Circuit parses the statute, stretching the modifier to reach the conclusion which, Mr. Lawrence submits, was unintended by Congress. It writes,

> We are satisfied that, in the wording of § 2244(d)(2), "State" modifies the phrase "post-conviction review" and the phrase "other collateral review." A petition for writ of certiorari to the United States Supreme Court is simply not an application for state review of any kind; it is neither an

> application for state post-conviction review nor an application for other state collateral review.[4]

But the logic here is undercut by an examination of certiorari's function, as pointed out by the dissent in *White v. Klitzkie*: "The United States Court . . . can consider state . . . cases when they raise federal issues. Otherwise, what is the United States Supreme Court hearing when it considers a state habeas petition on certiorari [?] Not an application for federal post-conviction review or other collateral review."[5]

Whatever predilections informed the Tenth's Circuit's conclusions about which words are modified by the word "state" and the nature of a writ of certiorari to this Court, it is also true that sound compelling arguments exist to support a contrary conclusion:

> The focus of section 2244(d)(2) is not the court in which the application is pending but on the application itself. As long as the petition for certiorari involves an application for state court relief, section 2244(d)(2) requires that the statute of limitations be tolled. The court where the application is pending is irrelevant.[6]

What about the statute's intent? It is almost a certainty that not a single member of Congress has represented a death sentenced individual in a post conviction matter under the AEDPA. Many Congressmen and Congresswomen are lawyers, however, and if they were to draw on their own common-sense reading of the statute as they

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[4] 182 F.3d 1153, 1156 (10th Cir. 1999).
[5] 282 F.3d 920, 927-8 (9th Cir. 2002).
[6] *Abela* at 170.

passed it, Mr. Lawrence submits that they clearly wanted to place a time limit on post conviction litigation, but that they saw one phase as "State" and one phase as "federal." To believe that the statute and the lawmakers intended to make a distinction between staying federal proceedings while a *petition for certiorari from the direct conviction in the State court went before this Court* and the scenario when a *petition for certiorari from the post-conviction litigation in State courts*, is to stretch common sense and credulity. Particularly when no Congressional History mentions such distinction; no meaningful purpose can be served other than lulling practitioners and ultimately defendants into either a calm belief that they had a grasp on the common-sense meaningof the statute, or into unknowingly, unintentionally, and involuntarily waiving their right to have the federal system protect federal rights.

Beginning the limitations period after the 90 days when a petitioner could seek this Court's certiorari review doesn't controvert the law's purpose of limiting the time when a petitioner has access to federal courts. Moreover, including the 90 days avoids the almost certainly unintended consequence of requiring a petitioner to file his petition seeking federal habeas corpus relief before he has sought certiorari review of his state post-conviction claims to this Court. Such an outcome does not promote finality of state court determinations and encourages the simultaneous filing of two actions seeking essentially the same relief.

The court in *Miller v. Dragovich*[7] suggests that the patent complications of comity and exhaustion raised by excluding the 90-day certiorari period could be avoided by having the federal district court hold the case in abeyance pending this Court's decision on state post-conviction review. The real-world implications presented by this simple fix – in terms of additional litigation, uncertainty and bother – are illustrated by *Coleman v. Davis*, where the petitioner filed a successful writ of certiorari to this Court had to sue for his day in federal court:

> In this case, the United States Supreme Court granted certiorari, vacated the decision of the Indiana Supreme Court, and remanded the case to that court for further review . . . . Thus the initial judgment of the Indiana Supreme Court was nullified, and as a result, Coleman's post-conviction petition was still "pending" until that court issued its judgment on December 29, 2000, and denied rehearing on March 20, 2001. Because the ultimate outcome of Coleman's petition for writ of certiorari was the invalidation of the Indiana Supreme Court's denial of his post-conviction petition, none of the time after the entry of that judgment can be charged under the statute because ultimately the case was still pending before that court. The grant of certiorari, and vacation of the Indiana court's order, retroactively tolled the statute. This is an appropriate outcome because it precludes simultaneous review of the same Indiana Supreme Court decision by both the United States Supreme Court and this court.[8]

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[7] 311 F.3d 574, 580-581 (3rd Cir. 2002).

[8] 175 F.Supp.2d 1109, 1110 (N.D.Ind.2001).

The better solution is to begin the limitations period after the possibility of this Court's nullification of the state court's denial of state post-conviction claims.

2. Title 28 U.S.C. § 2244(d) is a statute of limitations that is subject to equitable tolling, not a jurisdictional bar.[9] But such tolling is generally available only when the petitioner can show (1) extraordinary circumstances (2) beyond his control (3) that made it impossible to file his petition on time.[10]

The exception to this rule can be found in *Fahy v. Horn*, a case where the petition was 35 days late because of attorney error in interpreting debatable procedural provisions, the Third Circuit tolled the precise statute at issue here – applying equitable tolling in a capital case involving a petitioner convicted of killing 13 people.[11] The *Fahy* court reasoned that a court "must allow less than 'extraordinary' circumstances to trigger equitable tolling of the AEDPA's statute of

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[9] *Sandvik v. United States*, 177 F.3d 1269 (11th Cir.1999); *Henderson v. Johnson*, 1 F.Supp.2d 650 (S.D.Tex.1998).

[10] See *Pace v. DiGuglielmo*, 125 S.Ct. 1807 (2005); *Sandvik*, 177 F.3d at 1271-1272 (citing *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 96, 111 S.Ct. 453, 112 L.Ed.2d 435 (1990); *Calderon v. United States District Court*, 163 F.3d 530, 541 (9th Cir.1998)(en banc); *Miller v. New Jersey Department of Corrections*, 145 F.3d 976, 978 (10th Cir.), *cert. denied*, 119 S.Ct.(1998)); *Turner v. Singletary*, 46 F.Supp.2d 1238, 1242 (N.D.Fla.1999).

[11] 240 F.3d 239,245 (3rd Cir. 2001) cert. denied, *Horn v. Fahy*, 534 U.S. 944, 122 S.Ct. 323, 151 L.Ed.2d 241, (2001); accord *Banks v. Horn*, 272 F.3d 527, 534-35 (3rd Cir. 2001), rev'd on other grounds, 536 U.S. 266 (2002).

limitations when a [capital] petitioner has been diligent in asserting his or her calims and rigid application of the statute would be unfair."[12]

The court explained:

> If we refuse to equitably toll the statute, then we would deny this capital defendant federal review of his claims. Fahy diligently asserted his claims and the strategic choices he made during the appeal process were reasonable. When state law is unclear regarding the operation of a procedural filing requirement, the petitioner files in state court because of his or her reasonable belief that a § 2244 petition would be dismissed as unexhausted, and the state petition is ultimately denied on these grounds, then it would be unfair not to toll the statute of limitations during the pendency of that state petition up to the highest reviewing state court. We will therefore equitably toll the AEDPA's statute of limitations. We elect to exercise this leniency under the facts of this capital case where there is no evidence of abuse of the process.[13]

Equity applies here for a number of reasons. Lawrence's chief reason is the lack of clarity in the relevant law and the facts that Lawrence's strategic choices regarding Section 2244(d)(2) statute of limitations period were reasonable -- and indeed are so sound and sensible that Lawrence's position is the law everywhere the Sixth Circuit Court of Appeals enjoys jurisdiction.

When Lawrence filed his federal habeas claim on March 11, 2003 – as is evidenced by the split in the circuits – reasonable, educated minds disagreed (as they

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[12] *Fahy*, 240 F.3d at 245; see also Corjasso v. Ayers, 278 F.3d 847 (9th Cir. 2002) (tolling AEDPA's statute of limitations despite a procedural defect and listing cases.) Cf *Steed v. Head*, 219 F.3d 1298 (11th Cir. 2000).

[13] *Fahy* at 245.

do now) about the statute of limitations under 2244(d)(2). For this reason, this case is distinct from cases denying claims for equitable tolling where an arithmetic error has resulted in miscalculation of filing deadlines. Lawrence had been diligent and there is no evidence or allegation of abuse of process.

Rather than decide the larger question of 2244(d)(2) statute of limitations, this Court could bestow leniency on these narrow facts where Lawrence a petitioner -- facing death -- filed his habeas petition in federal court under the belief that it was timely because the validity of his state post-conviction claims was still under review before this Court.

Additionally other factors mitigate in favor of leniency. Where the *Fahy* court looked to the reasonableness of the petitioner's strategic choices and absence of abuse of process, other courts have considered the potential merits of the substantive claim barred under a statute of limitations. As the dissent in *Drew v. Department of Corrections* noted, "A statute of limitations contains an inherent element of harshness, since it operates to deprive litigants of the ability to protect their rights simply by the passage of time . . . . When certain circumstances prevent a litigant from acting within the statutory period, however, the doctrine of equitable tolling

abates this harshness by "stopping the clock" during the time the litigant was unable to act."[14]

We urge consideration of the merits of the Lawrence's underlying claim – gross ineffectiveness of counsel – in deciding whether to grant relief in equity. The facts of Lawrence's case are an example of the kind of circumstance that courts refer to when they note that barring a meritorious claim would be unjust.[15]

Other factors beyond the merit of Lawrence's habeas claims are (1) counsel who advised Lawrence was selected by, pre-qualified and monitored by the State of Florida under its registry statute[16] (2) Lawrence is nearly retarded and couldn't

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[14] 297 F.3d 1278 (11th Cir. 2002) (dissent).

[15] *Justice v. United States*, 6 F.3d 1474, 1475 (11th Cir.1993) ("The doctrine of equitable tolling abates the harsh operation of the statute of limitations under certain circumstances in which barring a plaintiff's potentially meritorious action would be unjust."); *Murray v. Carrier*, 477 U.S. 478 (1986) (Stevens, J. concurring)(A facially strong constitutional claim that questions the fundamental fairness of the very process by which a petitioner was convicted and sentenced "compels review regardless of procedural defaults."); see also *Hensley v. Mun. Court*, 411 U.S. 345, 349-50 the ability to cut through barriers of form and procedural mazes. The very nature of the writ demands that it be administered with the initiative and flexibility essential to insure that miscarriages of justice within its reach are surfaced and corrected." (internal quotation marks and citations omitted)).

[16] Lawrence acknowledges that erroneous advice of counsel does not generally form the basis of a successful application for equitable tolling. But the law is equally clear that Florida courts have a duty to monitor registry counsel's performance:

> The court shall monitor the performance of assigned counsel to ensure that the capital defendant is receiving quality representation. The court shall also receive and evaluate allegations that are made regarding the

CONCLUSION

THEREFORE, Petitioner GARY LAWRENCE , requests of this Court that it GRANT its Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit, directing it to grant the writ or, in the lesser alternative, remand the matter to the United States District Court for the Northern District of Florida for

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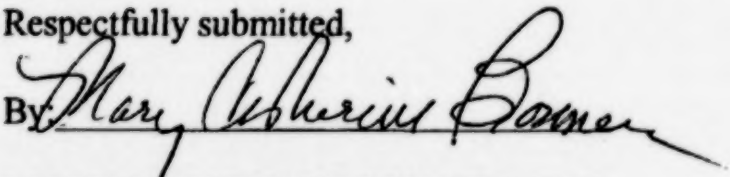
> performance of assigned counsel. The Chief Financial Officer, the Department of Legal Affairs, the executive director, or any interested person may advise the court of any circumstance that could affect the quality of representation, including, but not limited to, false or fraudulent billing, misconduct, failure to meet continuing legal education requirements, solicitation to receive compensation from the capital defendant, or failure to file appropriate motions in a timely manner.
>
> Florida Statutes section 27.711(12).

an evidentiary hearing or other appropriate disposition.

Respectfully submitted,

By: 

MARY CATHERINE BONNER, ESQ.
Counsel of Record for Mr. Lawrence
207 S.W. 12th Court
Ft. Lauderdale, FL 33315
(954) 523-6225

NO.

IN THE SUPREME COURT OF THE UNITED STATES

GARY LAWRENCE,

Petitioner,

VERSUS

STATE OF F LORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

MARY CATHERINE BONNER, ESQ.
Counsel of Record for Mr. Lawrence
207 S.W. 12th Court
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(954) 523-6225
Attorney for Petitioner

H

United States Court of Appeals,
Eleventh Circuit.
Gary LAWRENCE, Petitioner-Appellant,
v.
State of FLORIDA, Respondent-Appellee.
No. 04-15435.

Aug. 26, 2005.

Background: Defendant convicted of capital murder and sentenced to death, 698 So.2d 1219, petitioned for writ of habeas corpus. The United States District Court for the Northern District of Florida, No. 03-00097-CV-97-RH, Robert L. Hinkle, Chief Judge, denied petition as untimely, and appeal was taken.

Holding: The Court of Appeals, Dubina, Circuit Judge, held that petition was time-barred.
Affirmed.

West Headnotes

[1] Criminal Law ⇐1570
110k1570 Most Cited Cases
State has substantial interest in finality of state criminal proceedings, which is injured when stay is granted in post-conviction proceeding.

[2] Habeas Corpus ⇐818
197k818 Most Cited Cases
If district court denies habeas petition on procedural grounds without reaching petitioner's underlying constitutional claims, certificate of appeal (COA) should issue only if petitioner shows that jurists of reason would find it debatable whether petition states valid claim of denial of constitutional right, and that jurists of reason would find it debatable whether district court was correct in its procedural ruling. 28 U.S.C.A. § 2253(c).

[3] Habeas Corpus ⇐603
197k603 Most Cited Cases
Time during which petition for writ of certiorari is pending, or could have been filed, following denial of state post-conviction relief is not subtracted from running of one-year time period for filing of federal habeas petition. 28 U.S.C.A. § 2244(d)(1).

[4] Habeas Corpus ⇐603
197k603 Most Cited Cases
State's provision of post-conviction relief petitioner with allegedly incompetent attorney did not constitute type of state-created impediment that would toll running of one-year limitations period for filing of federal habeas petition. 28 U.S.C.A. § 2244(d)(1)(B).

[5] Habeas Corpus ⇐603
197k603 Most Cited Cases
Equitable tolling of one-year time period for filing of federal habeas petition is extraordinary remedy, sparingly applied when there are extraordinary circumstances that are both beyond petitioner's control and unavoidable even with diligence. 28 U.S.C.A. § 2244(d)(1).

[6] Habeas Corpus ⇐603
197k603 Most Cited Cases
State's provision of post-conviction relief petitioner with allegedly incompetent attorney did not constitute type of extraordinary circumstance that would toll running of one-year limitations period for filing of federal habeas petition. 28 U.S.C.A. § 2244(d)(1)(B).

[7] Habeas Corpus ⇐603
197k603 Most Cited Cases
Habeas petitioner's mental impairments was not extraordinary circumstance that would toll running of one-year limitations period for filing of federal habeas petition, absent showing of causal connection between such impairments and his ability to file timely petition; petitioner had IQ of 81, and did not claim mental incompetence per se. 28 U.S.C.A. § 2244(d)(1)(B).

***1222** Mary Catherine Bonner (Court-Appointed), Attorney at Law, Ft. Lauderdale, FL, for Petitioner-Appellant.

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Cassandra Kaye Dolgin, Tallahassee, FL, for Respondent-Appellee.

Appeal from the United States District Court for the Northern District of Florida.

Before DUBINA, BLACK and CARNES, Circuit Judges.

DUBINA, Circuit Judge:

This is a death penalty case in which the Certificate of Appealability ("COA") presents only one issue for our review: whether the one-year limitations period of the Antiterrorism and Effective Death Penalty Act ("AEDPA"), 28 U.S.C. § 2244(d)(1), bars petitioner **Gary Lawrence's** habeas petition. After reviewing the record, reading the parties' briefs, and having the benefit of oral argument, we agree with the district court that Lawrence's petition was untimely. Accordingly, we affirm the district court's order.

BACKGROUND

In March 1995, a Florida jury convicted Lawrence of one count each of premeditated murder in the first degree, conspiracy to commit murder, petit theft, and grand theft of a motor vehicle. The jury recommended a death sentence based on the murder conviction, and the trial court followed the jury's recommendation and imposed a death sentence. The Florida Supreme Court summarized the facts of the murder as follows:

> Shortly after **Gary** and Brenda **Lawrence** were married, they separated, and another man, Michael Finken, moved in with Brenda and her two daughters, Stephanie and Kimberly Pitts, and Stephanie's friend, Rachel Matin. On the day of the murder, July 28, 1994, Gary and Michael drove Brenda to work and then drank beer at a friend's house. Later, Gary and Michael picked Brenda up and the three returned to the friend's house where they drank more beer. After the three returned to Brenda's apartment, Gary and Michael argued and Gary hit Michael when he learned that Michael had been sleeping with Brenda. Gary and Michael seemed to resolve their differences, and Michael fell asleep on the couch. Gary and Brenda conversed, and Brenda went through the house collecting weapons--including a pipe and a baseball bat. Gary and Brenda told Kimberly and Rachel that they were "going to knock off Mike." Gary told Kimberly to "stay in your bedroom no matter what you hear."

The trial court described what happened after Gary and Brenda spoke to the girls:

> Thereafter, the two girls heard what they described as a pounding sound. At one point, Rachel Matin stated that she heard the victim say, "stop it, if you stop, I'll leave." She stated that she heard that statement several times. Kimberly Pitts stated she heard the victim say, "please don't hit me, I'm already bleeding." The victim's pleas, however, were met with more pounding. Once the pounding stopped, the girls were required to assist in the clean up and described to the jury what they observed. Kimberly stated that much of the victim's right side of his face was missing and his chin was knocked over ***1223** to his ear. Rachel Matin stated that there was no skin left on the victim's face and part of his nose was missing. Apparently the victim was still alive. Kimberly observed her mother coming out of the kitchen area with what appeared to be a dagger and then, although not seeing the dagger in her hand at the time, observed her mother make a stabbing motion toward the victim with something in her hand. It was at that time when Brenda Lawrence requested that the girls obtain the assistance of Chris Wetherbee. Upon his entrance into the home, Chris Wetherbee observed the victim's head being caved in, blood all over, the victim's eyeball protruding approximately three inches and a mop handle shoved into the victim's throat. Wetherbee asked **Gary Lawrence**, "what's going on?" At which time the Defendant responded by pulling out the mop handle and kicking the victim and making the statement "this is what's going on." Immediately after removing the mop handle from the victim's throat, Wetherbee heard the victim give approximately three or four ragged breaths at which time the victim thereafter stopped breathing and apparently expired. The Defendant, **Gary Lawrence**, told Wetherbee that he had beat him with a pipe until it bent and then beat him with a baseball bat.
>
> Chris Wetherbee summarized the victim's state: "And [he] looked like something off of one of the

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real good horror movies." Gary and Brenda then removed a small amount of money from Michael's pockets, wrapped the body in a shower curtain and placed the body in Michael's car, and Gary drove to a secluded area where he set the body afire. When Gary returned home, he and Brenda danced. *Lawrence v. State*, 698 So.2d 1219, 1220 (Fla.1997).

The Florida Supreme Court affirmed Lawrence's conviction and sentence. *Id.* The United States Supreme Court denied certiorari review on January 20, 1998. *Lawrence v. Florida*, 522 U.S. 1080, 118 S.Ct. 863, 139 L.Ed.2d 761 (1998). Lawrence sought state post-conviction relief, and the trial court denied the petition on October 11, 2000. The Florida Supreme Court affirmed the trial court's denial of state post-conviction relief. *Lawrence v. State*, 831 So.2d 121 (Fla.2002). The United States Supreme Court denied certiorari review of the Florida Supreme Court's denial of post-conviction relief. *Lawrence v. Florida*, 538 U.S. 926, 123 S.Ct. 1575, 155 L.Ed.2d 319 (2003).

Lawrence then moved to federal court seeking habeas relief pursuant to 28 U.S.C. § 2254. The filing of his March 11, 2003, federal pro se petition sparked an unusual procedural journey. After filing an amended habeas petition, the State responded that the district court should dismiss the petition because Lawrence was time-barred from obtaining federal habeas relief on either the original petition or the amended petition. The State also argued that equitable tolling should not apply in Lawrence's case. Lawrence opposed the dismissal on the basis that there was a disagreement among the courts of appeal on the question whether a petition for certiorari to the U.S. Supreme Court following the denial of state post-conviction relief tolls the limitation period. Lawrence sought to invoke the doctrine of equitable tolling on the grounds that it was appropriate because (1) counsel who advised him of the timing of his petition was selected by and pre-qualified by the State of Florida under its registry statute; (2) his mental abilities prevented him from meaningfully participating in a relationship with his counsel; and (3) he had a facially strong constitutional claim.

*1224 On April 12, 2004, the district court entered an order staying the proceedings. The court determined that whether Lawrence's petition was time-barred "depends upon whether the one-year limitations period was tolled during the pendency of Petitioner's petition for writ of certiorari in the United States Supreme Court challenging the state court's denial of his motion for state collateral review." [Dist. Ct. Order 28 at 1-2]. The court noted that there was a circuit split on the issue, although Eleventh Circuit precedent clearly stated that the limitations period was not tolled during the pendency of a petition for certiorari challenging the state court's denial of post-conviction relief. *See Coates v. Byrd*, 211 F.3d 1225, 1227 (11th Cir.2000). On the question of equitable tolling, the district court found that Lawrence had not met the prerequisites to equitable tolling. However, in light of the pending certiorari petition in *Abela v. Martin*, 348 F.3d 164 (6th Cir.2003), *cert. denied sub nom. Caruso v. Abela*, 541 U.S. 1070, 124 S.Ct. 2388, 158 L.Ed.2d 976 (2004), which held contrary to this circuit's decision in *Coates*, 211 F.3d at 1227, the district court entered an order staying the proceedings. The district court noted that if the Supreme Court denied review in *Abela*, then it would dismiss Lawrence's petition based on *Coates*. [Dist. Ct. Order 28 at 1-2].

Subsequently, on May 27, 2004, after the Supreme Court denied review in *Caruso v. Abela*, the district court noted in an order that Lawrence's petition was time-barred based on *Coates*. [Dist. Ct. Order 34 at 2]. However, the court did not enter an order dismissing the petition because the State had lodged an appeal from the district court's stay order. After this court dismissed the State's appeal from the stay order for lack of jurisdiction, the district court entered the order dismissing the petition. Lawrence filed a motion for a COA, which the district court granted. The district court set forth the issue in the COA as "whether the one-year limitations period applicable to a petition for writ of habeas corpus under 28 U.S.C. § 2254 barred this petition, and on the legal issue whether the statute of limitations is tolled during the pendency of a petition for writ of certiorari in the United States Supreme Court challenging the state court's denial of petitioner's earlier motion for state collateral review." [Dist. Ct. Order 45, at 4].

DISCUSSION

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[1] The only issue presented in the COA is whether the one-year limitations period under AEDPA bars Lawrence's habeas petition. After needless delay, the district court determined that Lawrence's petition was untimely.[FN1] "The district court's interpretation and application of a statute of limitations is a question of law that is subject to de novo review." *Hepburn v. Moore*, 215 F.3d 1208, 1209 (11th Cir.2000). We also review de novo the district court's legal decision on equitable tolling. *Drew v. Dep't of Corr.*, 297 F.3d 1278, 1283 (11th Cir.2002); *Steed v. Head*, 219 F.3d 1298, 1300 (11th Cir.2000). However, we will reverse the district court's factual determinations only if they are clearly erroneous. *Drew*, 297 F.3d at 1283. The district court's finding whether a party was diligent in ascertaining the federal habeas filing deadline is a finding ***1225** of fact. *See id.* at 1287, 1287 n. 2 (stating that "[t]reating a finding regarding diligence as a finding of fact is consistent with the approach taken by the majority of the circuits in both habeas corpus proceedings and other contexts").

> FN1. We say needless delay because we conclude that the district court abused its discretion in entering a stay order pending a certiorari ruling by the United States Supreme Court in *Caruso v. Abela*, 541 U.S. 1070, 124 S.Ct. 2388, 158 L.Ed.2d 976 (2004). The stay injured the State because the State has a substantial interest in the finality of state criminal proceedings. *See McCleskey v. Zant*, 499 U.S. 467, 493, 111 S.Ct. 1454, 1470, 113 L.Ed.2d 517 (1991). "Each delay, for its span, is a commutation of a death sentence to one of imprisonment." *Thompson v. Wainwright*, 714 F.2d 1495, 1506 (11th Cir.1983).

We begin our discussion by setting forth the limited circumstance under which a court may issue a COA. The right to appeal is governed by the COA requirements set forth in 28 U.S.C. § 2253(c):

> *(c)(1)* Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from--
>
> *(A)* the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
>
> *(B)* the final order in a proceeding under section 2255.
>
> *(2)* A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.
>
> *(3)* The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

28 U.S.C. § 2253(c).

[2] Under this limited provision, if a district court denies a habeas petition on procedural grounds without reaching the petitioner's underlying constitutional claims, a COA should issue only if the petitioner shows "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right, and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 478, 120 S.Ct. 1595, 1601, 146 L.Ed.2d 542 (2000). "[B]oth showings [must] be made before the court of appeals may entertain the appeal." *Id.* at 485, 120 S.Ct. at 1604. If the procedural bar is obvious and the district court correctly invoked it to dispose of the case, "a reasonable jurist could not conclude either that the district court erred in dismissing the petition or that the petitioner should be allowed to proceed further." *Id.* at 484, 120 S.Ct. at 1604. The court may first resolve the issue whose answer is more apparent from the record and the arguments. *Id.* at 485, 120 S.Ct. at 1604. "The recognition that the court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of, allows and encourages the court to first resolve procedural issues." *Id.* (quotations and citation omitted).

[3] Because of the statutory constraint in issuing a COA, we are puzzled by the district court's issuance of a COA in this case. The district court should not have issued a COA on the statute of limitations issue because binding circuit precedent clearly disposed of the issue. "[T]he time during which a petition for writ of certiorari is pending, or could have been filed, following the denial of collateral relief in the state courts, is not to be subtracted from the running of time for 28 U.S.C. §

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2244(d)(1) statute of limitations purposes." *Coates*, 211 F.3d at 1227. On that basis, jurists of reason would not find the timeliness issue debatable in this circuit. Thus, a COA should not have issued.

However, the district court did issue a COA on the statute of limitations issue. Although the COA does not specifically state that the exceptions to the statute of limitations--State impediment and equitable tolling--are included within the COA, Lawrence contends that these exceptions are subsumed within the COA and properly before this court for consideration. We agree. To decide whether the statute of limitations bars Lawrence's federal habeas petition, we must consider whether a State ***1226** impediment or equitable tolling excepts the one-year filing deadline. If Lawrence can demonstrate that a State impediment prevented him from timely filing or that equitable tolling applies to his case, then his petition is timely.

[4] Lawrence contends that 28 U.S.C. § 2244(d)(1)(B) [FN2] applies to his case because the State caused an impediment to his timely filing by providing him with an incompetent attorney through the Florida counsel registry system. It is not clear, however, that Lawrence asserted a § 2244(d)(1)(B) impediment to the district court. We generally do not consider an issue that was not raised in the district court. *Calzadilla v. Banco Latino Int'l*, 413 F.3d 1285, 1287 (11th Cir.2005); *Rhine v. Boone*, 182 F.3d 1153, 1154 (10th Cir.1999) (refusing to consider § 2244(d)(1)(B) argument because petitioner did not argue in district court that State had created an impediment to his filing in violation of the Constitution). Assuming Lawrence presented this issue to the district court, we conclude that Lawrence's assertion that the State impeded him from timely filing by providing an incompetent attorney to assist him after setting up a State registry system to monitor attorney performance, is meritless. This is not the type of State impediment envisioned in § 2244(d)(1)(B).

> FN2. This provision states that the one-year limitation period shall begin to run on "the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action." 28 U.S.C. § 2244(d)(1)(B).

[5] Additionally, Lawrence cannot show that there are extraordinary circumstances present in his case to warrant the application of equitable tolling. "Equitable tolling is an extraordinary remedy which is typically applied sparingly." *Steed*, 219 F.3d at 1300. It is available "when a movant untimely files because of extraordinary circumstances that are both beyond his control and unavoidable even with diligence." *Sandvik v. United States*, 177 F.3d 1269, 1271 (11th Cir.1999). Equitable tolling is limited to rare and exceptional circumstances, such as when the State's conduct prevents the petitioner from timely filing. *Gibson v. Klinger*, 232 F.3d 799, 808 (10th Cir.2000); *see also Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96, 111 S.Ct. 453, 458, 112 L.Ed.2d 435 (1990) (stating that the Court has allowed equitable tolling in situations where complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass); *Arce v. Garcia*, 400 F.3d 1340, 1349 (11th Cir.2005) (noting that in order to invoke equitable tolling, courts usually require some affirmative misconduct, such as deliberate concealment).

[6] Making the most of a novel argument, Lawrence posits that the State's provision to him of an incompetent attorney justifies the imposition of equitable tolling. This is not an extraordinary circumstance that warrants the application of equitable tolling. Moreover, we have stated on numerous occasions that "attorney negligence is not a basis for equitable tolling, especially when the petitioner cannot establish his own diligence in ascertaining the federal habeas filing deadline." *Howell v. Crosby*, 415 F.3d 1250, 1250 (11th Cir.2005); *accord Helton v. Secretary for the Dep't of Corr.*, 259 F.3d 1310, 1313 (11th Cir.2001); *Steed*, 219 F.3d at 1300; *Sandvik*, 177 F.3d at 1270.

[7] Lawrence also contends that his mental incapacity prevented him from timely filing and justifies the invocation of equitable tolling. However, Lawrence cannot establish a causal connection between his alleged mental incapacity and his ability to file a timely petition. Lawrence ***1227** admits in his appellate brief

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that medical reports state that his full scale IQ is 81, and he admits that he did not make the assertion that he was mentally incompetent per se. Instead, Lawrence claims that his initial pleading made it clear that he has suffered from mental impairments his entire life. However, this contention, without more, is insufficient to justify equitable tolling. *See* Bilbrey v. Douglas, 124 Fed.Appx. 971, 973 (6th Cir.2005) (finding that equitable tolling did not apply because petitioner "failed to establish a causal connection between her mental condition and her ability to file a timely petition"); *Green v. Hinsley*, 116 Fed.Appx. 749, 751 (7th Cir.2004) (finding that equitable tolling did not apply because petitioner failed to submit evidence of how his low IQ would render him incompetent or prevent him from timely filing his petition); *Fisher v. Gibson*, 262 F.3d 1135, 1145 (10th Cir.2001) (finding that petitioner's mere allegations of incompetency at the time of his guilty pleas did not suffice to warrant equitable tolling of the limitations period); *Collins v. Scurr*, 230 F.3d 1362 (8th Cir.2000) (Table) (finding that bald and unsupported assertions that relate to an instance of alleged mental incompetency that occurred at a time remote to petitioner's habeas petition filing deadline did not equitably toll the statute of limitations); *Fisher v. Johnson*, 174 F.3d 710, 716 (5th Cir.1999) (finding that equitable tolling did not apply when petitioner's brief period of incapacity "occurred at a time so remote to his deadline" and petitioner could not show that he diligently pursued his application the remainder of the one-year filing deadline); *cf. Laws v. Lamarque*, 351 F.3d 919, 923 (9th Cir.2003) (remanding case for further factual development on issue of whether petitioner's mental illness prevented him from timely filing his federal habeas petition as to warrant the application of equitable tolling); *Nara v. Frank*, 264 F.3d 310, 320 (3d Cir.2001) (remanding case for further factual development where petitioner "presented evidence of ongoing, if not consecutive, periods of mental incompetency" because mental incompetence may constitute an extraordinary circumstance for purposes of tolling the statute of limitations when a person's mental deficiency affects his ability to file a timely habeas petition).

CONCLUSION

For the above stated reasons, we affirm the district court's order dismissing Lawrence's habeas petition as untimely.

AFFIRMED.

421 F.3d 1221, 18 Fla. L. Weekly Fed. C 884

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

GARY LAWRENCE

VS

CASE NO. 3:03CV97 RH

STATE OF FLORIDA

JUDGMENT

Pursuant to and at the direction of the Court, it is

ORDERED AND ADJUDGED that the Petition for writ of habeas corpus is DENIED as untimely

WILLIAM M. McCOOL, CLERK OF COURT

September 20, 2004
DATE

s/ Ma'Su Sweeney
Deputy Clerk: Ma'Su Sweeney

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA PENSACOLA DIVISION

GARY LAWRENCE,

Petitioner,

v. CASE NO. 3:03cv97-RH

STATE OF FLORIDA,

Respondent.

_____/

ORDER FOR DISMISSAL

For the reasons set forth in the orders of April 13, 2004 (document 28), April 21, 2004 (document 30), and May 27, 2004 (document 34), and in light of the dismissal of respondent's attempted appeal, denial of the petition as untimely now is appropriate. Accordingly,

IT IS ORDERED:

The clerk shall enter judgment stating, "The petition for writ of habeas corpus is DENIED as untimely." Petitioner's motion for an extension of time (document 38) is DENIED as moot. The clerk shall close the file.

SO ORDERED this 16th day of September, 2004.

s/Robert L. Hinkle
Chief United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA PENSACOLA DIVISION

GARY LAWRENCE,

Petitioner,

v. CASE NO. 3:03cv97-RH

STATE OF FLORIDA,

Respondent.

_____/

ORDER GRANTING CERTIFICATE OF APPEALABILITY

Final judgment has been entered denying this petition for writ of habeas corpus under 28 U.S.C. §2254. Petitioner has filed a timely notice of appeal. Under 28 U.S.C. §2253(c)(1), however, petitioner may not appeal unless a certificate of appealability is issued. Under *Edwards v. United States*, 114 F.3d 1083 (11th Cir. 1997), petitioner's notice of appeal is deemed an application for a certificate of appealability. Petitioner also has filed separate motions for a certificate of appealability, for appointment of counsel for appeal, and for leave to proceed on appeal in forma pauperis. Respondent has filed a memorandum in opposition.

BEST AVAILABLE COPY

A certificate of appealability may be issued only if petitioner "has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). *See Miller-El v. Cockrell*, 537 U.S. 322, 336, 123 S. Ct. 1029, 1039-40. 154 L. Ed. 2d 931 (2003) (explaining meaning of this term); *Slack v. McDaniel*, 529 U.S. 473, 483-84, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000) (same); *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4, 103 S. Ct. 3383, 77 L. Ed. 2d 1090 (1983); *see also Williams v. Taylor*, 529 U.S. 362, 402-13, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000) (setting forth standards applicable to §2254 petitions on the merits). As the Court said in *Slack*:

> To obtain a COA under § 2253(c), a habeas prisoner must make a substantial showing of the denial of a constitutional right, a demonstration that, under *Barefoot*, includes showing that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were "'adequate to deserve encouragement to proceed further.'"

Slack, 529 U.S. at 483-84, *quoting Barefoot*, 463 U.S. at 893 n.4. Further, in order to obtain a certificate of appealability when dismissal is based on procedural grounds, a petitioner must show, "at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack*, 529 U.S. at 484.

In the case at bar, the petition was denied as untimely. The dispositive issue is whether the one-year limitations period applicable to a petition for writ of habeas corpus under 28 U.S.C. §2254 is tolled during the pendency of a petition for writ of certiorari in the United States Supreme Court challenging the state court's denial of petitioner's earlier motion for state collateral review. *See* 28 U.S.C. §2244(d)(2) ("The time during which a properly filed application for State post-conviction or other collateral review . . . is pending shall not be counted toward any period of limitation under this subsection."). There is a circuit split on this issue. *Compare, e.g., Coates v. Byrd*, 211 F.3d 1225, 1227 (11th Cir. 2000), *and Steed v. Head, 219 F.3d 1298*, 1300 (11th Cir. 2000), *with Abela v. Martin*, 348 F.3d 164 (6th Cir. 2003) (en banc), *cert. denied sub nom. Caruso v. Abela*, 72 U.S.L.W. 3506. 2004 WL 193884 (May 24, 2004) (No. 03-1079).

Jurists of reason could not debate whether this issue is settled at the panel level in the Eleventh Circuit; under *Coates* and *Steed*, the issue is settled. But jurists of reason could find it debatable whether the Eleventh Circuit view, as set forth in *Coates* and *Steed*, or the Sixth Circuit view, as set forth in *Abela*, ultimately is correct. A certificate of appealability properly should be issued so that petitioner can pursue the possibility of en banc or Supreme Court review of this issue. Petitioner also asserts equitable tolling, an issue that appropriately may be addressed in conjunction with the legal issue that is the subject of the circuit

split.

For the same reasons, I find that petitioner's appeal is taken in good faith, and that he therefore should be allowed to proceed in forma pauperis on appeal.

Accordingly,

IT IS ORDERED:

1. Petitioner's notice of appeal (document 10), treated as an application for a certificate of appealability, and petitioner's motion for issuance of a certificate of appealability (document 45), are GRANTED.

2. A certificate of appealability is hereby issued on the question whether the one-year limitations period applicable to a petition for writ of habeas corpus under 28 U.S.C. §2254 barred this petition, and on the legal issue whether the statute of limitations is tolled during the pendency of a petition for writ of certiorari in the United States Supreme Court challenging the state court's denial of petitioner's earlier motion for state collateral review. *See* 28 U.S.C. §2244(d)(2) ("The time during which a properly filed application for State post-conviction or other collateral review . . . is pending shall not be counted toward any period of limitation under this subsection."); *compare, e.g., Coates v. Byrd*, 211 F.3d 1225, 1227 (11th Cir. 2000), *and Steed v. Head*, 219 F.3d 1298, 1300 (11th Cir. 2000), *with Abela v. Martin*, 348 F.3d 164 (6th Cir. 2003) (en banc), *cert. denied sub nom. Caruso v. Abela*, 72 U.S.L.W. 3506. 2004 WL 193884 (May 24, 2004) (No. 03-

1079).

3. Petitioner's motion for appointment of counsel (document 46) is GRANTED. The appointment of Mary Catherine Bonner as attorney for petitioner is continued for purposes of appeal.

4. Petitioner's motion for leave to proceed on appeal in forma pauperis (document 47) is GRANTED.

SO ORDERED this 15th day of November, 2004.

s/Robert L. Hinkle
Chief United States District Judge